Mohd Isa bin Mohd Nor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05–220 OF 2009
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND BALIA YUSOF JJCA
6 MARCH 2013

Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence of murder — Accused visited deceased's office and left with blood-stained shirt — Witnesses heard shouts seeking help — Absence of eyewitness — Whether prosecution succeeded in proving case — Whether accused had actus reus required — Conduct of accused in running away from crime scene — Penal Code s 302

Evidence — Witness — Credibility of — Witness was friend of accused — Witness admitted to being drug addict — Prosecution's arguments relied on drug addict witness' testimony — Whether safe to convict accused based on testimony of drug addict witness

In the High Court, the appellant was convicted for an offence under s 302 of the Penal Code and subsequently sentenced to death. The prosecution couched its argument based on the testimony of SP9. On the eventful night when the tragedy took place, SP9 had invited the appellant to look for drugs. The appellant rode the motorcycle with SP9 riding pillion and headed to the crime scene to allegedly collect some money. SP9 waited on the motorcycle while the appellant went to the office. Ten minutes later, SP9 heard the shouts of a female voice asking for help. The appellant then hurriedly left the deceased's office carrying a lady's handbag and a Rambo knife. The attire worn by the appellant was covered with blood at the waist level. When asked, the appellant simply stated that the deceased and he had merely quarrelled. SP9 was not the only one who heard the shout for help as the deceased's employee ('Pak Suri') had heard it too. When Pak Suri decided to head to the deceased's office, he discovered her dead body. However, attempts to trace Pak Suri proved futile. Post mortem conducted on the deceased's body by SP11 revealed that the deceased died due to her injuries. According to SP11, the injuries could cause death within a short span of time and if not treated immediately, the injured person had no chance of survival. In his defence, the appellant argued that he had accidentally pierced the deceased during the quarrel and there was no intention to kill. The appellant's counsel also pointed out that it was dangerous to convict the appellant based on the evidence of SP9 who was a drug addict. However, the High Court judge made a finding of fact that the SP9's testimony was credible and went on to convict the appellant for murder and sentence him to death. In

the present appeal, the issues raised before the court were whether there was actus reus or mens rea on the appellant's part; and the conduct of the appellant in running away. It was the appellant's contention that there was no eyewitness who saw the killing.

Held, dismissing the appeal:

(1) Every thread of circumstantial evidence tendered and produced by the prosecution when combined together was strong enough to make a rope that would link the appellant to the charge of murder and that rope was also strong enough to convict him beyond reasonable doubt (see para 45).

(2) SP9 was a witness worth of credit and no taint should accordingly be attached to him. Although SP9 admitted that he was a drug addict, his evidence was not wanting in credibility. SP9 could have chosen not to reveal his background as a drug addict but he chose to be forthright and came clean before the High Court and told the truth. SP9 could have turned turtle and not render any evidence in favour of the prosecution, yet he testified and revealed everything to the High Court judge. Furthermore, the evidence of SP9 was supported by Pak Suri whose statement was recorded under s 112 of the Criminal Procedure Code ('CPC'). The statement was admissible under s 32 of the CPC (see paras 52–54).

(3) This was a clear cut case where the appellant had used a Rambo knife and had attacked a vital part of the deceased's body. SP11 testified that the injuries sustained by the deceased would cause death within a short span of time. In such a situation, the deceased would not stand a chance to survive unless immediate medical assistance was rendered. It was purely a matter of inference by looking at the nature of the wounds to conclude that there was an intention to kill when the appellant inflicted those injuries (see paras 85, 88–89).

(4) The act of fleeing or absconding from the crime scene was purely a question of fact which varied from case to case. Here, SP9 heard two shouts for help from the deceased's office and SP9 was certain that it was a female voice. Pak Suri also heard the deceased's shouting for help three times in a row in a loud voice. As an employee of the deceased, Pak Suri was familiar with the deceased's voice and according to him, the deceased never shouted like that and she sounded as though she was in pain. These were the damning circumstances that strongly suggested a nexus between the appellant's conduct and the offence. Such conduct was admissible under s 8 of the Evidence Act 1950 (see para 92).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu disabitkan atas kesalahan di bawah s 302 Kanun Keseksaan dan dijatuhkan hukuman mati. Pihak pendakwaan menyandarkan hujahan mereka berdasarkan testimoni oleh SP9. Pada malam berlakunya kejadian tersebut, perayu telah mengajak SP9 untuk mencari dadah. Perayu menunggang motosikal dengan SP9 memboncengnya dan menuju ke arah tempat kejadian, kononnya untuk mengutip wang. SP9 menunggu di atas motosikal manakala perayu masuk ke dalam pejabat tersebut. Sepuluh minit kemudian, SP9 terdengar jeritan suara seorang wanita meminta tolong. Perayu kemudiannya tergesa-gesa keluar meninggalkan pejabat si mati sambil membawa sebuah beg tangan wanita dan pisau Rambo. Pakaian yang dipakai oleh perayu berlumuran darah hingga ke paras pinggang. Apabila ditanya, perayu hanya menyatakan bahawa si mati dan dia hanya sekadar bertengkar. Bukan SP9 sahaja yang telah terdengar jeritan meminta tolong tersebut kerana pekerja si mati ('Pak Suri') juga turut mendengarnya. Apabila Pak Suri ke pejabat si mati, dia menjumpai mayat si mati. Walau bagaimanapun, langkah-langkah untuk menjejaki Pak Suri gagal. Bedah siasat ke atas mayat si mati yang dijalankan oleh SP11 menunjukkan bahawa si mati meninggal dunia akibat kecederaannya. Menurut SP11, kecederaan-kecederaan tersebut boleh menyebabkan kematian dalam jangka masa singkat dan jika tidak dirawat serta-merta, orang yang tercedera tidak mempunyai peluang untuk hidup. Dalam pembelaannya, perayu menghujahkan bahawa dia secara tidak sengaja telah menikam si mati ketika pertengkaran mereka dan tidak mempunyai niat untuk membunuh. Peguam perayu juga menghujahkan bahawa adalah tidak selamat untuk menyabitkan perayu berdasarkan keterangan SP9 yang merupakan seorang penagih dadah. Walau bagaimanapun, hakim Mahkamah Tinggi membuat dapatan fakta bahawa testimoni SP9 adalah kredibel dan seterusnya menyabitkan perayu atas kesalahan membunuh dan menjatuhkan hukuman mati ke atasnya. Dalam rayuan ini, isu-isu yang dibangkitkan di hadapan mahkamah adalah sama ada terdapat actus reus atau mens rea pada bahagian perayu; dan perlakuan perayu yang melarikan diri. Adalah menjadi hujahan perayu bahawa tidak terdapat saksi yang melihatnya melakukan pembunuhan tersebut.

Diputuskan, menolak rayuan:

(1) Setiap rantaian keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan apabila digabungkan bersama-sama adalah cukup kuat untuk membentuk suatu tali yang mengaitkan perayu dengan pertuduhan membunuh dan tali tersebut juga cukup kuat untuk menyabitkannya melampaui keraguan munasabah (lihat perenggan 45).

(2) SP9 adalah saksi yang layak mendapat kredit dan tiada kecacatan yang harus dihubung kaitkan padanya. Walaupun SP9 mengaku bahawa dia seorang penagih dadah, keterangannya tidak memerlukan kredibiliti. SP9 boleh sahaja memilih untuk tidak mendedahkan latar belakangnya

sebagai penagih dadah tetapi dia memilih untuk berlaku jujur dan mengaku di hadapan mahkamah serta memberitahu kebenarannya. SP9 boleh sahaja memusingkan keadaan dan tidak memberikan apa-apa keterangan berpihak kepada pihak pendakwaan, namun dia telah memberikan keterangan dan mendedahkan segalanya kepada hakim Mahkamah Tinggi. Tambahan lagi, keterangan SP9 disokong oleh pernyataan Pak Suri yang telah direkodkan di bawah s 112 Kanun Tatacara Jenayah ('KTJ'). Pernyataan tersebut boleh diterima di bahawa s 32 KTJ (lihat perenggan 52–54).

(3) Ini adalah kes yang jelas dan nyata di mana perayu telah menggunakan pisau Rambo dan menyerang bahagian badan mangsa yang vital. SP11 memberi keterangan bahawa kecederaan-kecederaan yang dialami oleh si mati boleh menyebabkan kematian dalam jangka masa singkat. Dalam keadaan sedemikian, si mati tidak mempunyai peluang untuk hidup melainkan diberikan bantuan perubatan dengan segera. Ia adalah hal perkara inferens yang dibuat dengan melihat kepada sifat luka-luka untuk memutuskan bahawa terdapat niat untuk membunuh apabila perayu menyebabkan kecederaan-kecederaan tersebut (lihat perenggan 85, 88–89).

(4) Tindakan melarikan diri atau menghilangkan diri dari tempat kejadian adalah persoalan fakta yang berbeza daripada kes ke kes. Di sini, SP9 telah terdengar dua jeritan meminta tolong dari arah pejabat si mati dan SP9 yakin bahawa ia adalah suara seorang wanita. Pak Suri juga terdengar jeritan si mati meminta tolong sebanyak tiga kali berturut-turut dengan suara yang lantang. Sebagai pekerja si mati, Pak Suri sudah biasa dengan suara si mati dan menurutnya, si mati tidak pernah menjerit seperti itu dan si mati kedengaran seperti berada dalam kesakitan. Ini adalah hal keadaan kukuh yang mencadangkan hubungan antara perlakuan perayu dan kesalahan tersebut. Perlakuan tersebut boleh diterima di bawah s 8 Akta Keterangan 1950 (lihat perenggan 92).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on credibility of, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3152–3206.

Cases referred to

Anant Chintaman Lagu v The State of Bombay AIR 1960 SC 500, SC (refd)
Bhagwandas Keshwani etc v State of Rajasthan AIR 1974 SC 898, SC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, PC (refd)
Er Ah Kiat v PP [1965] 2 MLJ 238, FC (refd)
Jaswant v State (Delhi Administration) AIR 1979 SC 190, SC (refd)

Kee Lik Tian v PP [1984] 1 MLJ 306 (refd)
Leong Hong Khie Tan Gong Wai v PP [1986] 2 MLJ 206, FC (refd)
Meli v R [1954] 1 WLR 228, PC (refd)
Mohan Lai Pangasa v The State of UP AIR 1974 SC 1144, SC (refd)
Ng Thian Soong v PP [1990] 2 MLJ 148, SC (refd)
Percival Leonard Taylor, James Weaver and George Thomas Donovan (1928) 21 Cr App R 20 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Mohamad Fairus bin Omar [1997] 5 MLJ 57, HC (refd)
PP v Mohamed Ali [1962] 1 MLJ 257 (refd)
PP v Visuvanathan [1978] 1 MLJ 159 (refd)
Tan Buck Tee v PP [1961] 1 MLJ 176, CA (refd)
Tan Joo Cheng v PP [1992] 1 SLR 620, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465, SC (refd)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 ss 8, 27, 32
Penal Code ss 299, 300, 300(c), (d), 302

Bernard George (Tay, Bernard & Cheong) for the appellant/accused.
Munahyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The High Court judge convicted the appellant for an offence under s 302 of the Penal Code, after a full trial, and sentenced him to death. Aggrieved, the appellant now appeals to this court. The charge framed against the appellant reads as follows:

> Bahawa kamu, pada 25 April 2005 jam lebih kurang 3.00 petang, di dalam pejabat Thian Shee Metal Trading, Batu 5 1/2, Jalan Kuala Pilah, Paroi, di dalam Daerah Seremban, di dalam Negeri Sembilan, telah membunuh dan menyebabkan kematian NG ENG NIO (No. K.P.: 570128-04-5836), oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

THE FACTUAL MATRIX

[2] Nor Azlan Rose bin Nor Azizan ('SP9'), has been a friend of the appellant for five years prior to the incident. SP9 also knew the appellant's family and the appellant's house which was located approximately 9km from SP9's house. Both SP9 and the appellant were colleagues and they worked as security guards. According to SP9, both he and the appellant used to go to the deceased's shop which was located at Batu 6, Jalan Kuala Pilah. SP9 knew the deceased and he called the deceased by the name of 'Ah Son'.

[3] On 25 April 2005 at about 10am, SP9 walked to the appellant's house. On arrival at the appellant's house, SP9 met the appellant's mother. Since the appellant was still asleep, SP9 asked the appellant's mother to waken the appellant. SP9 was at the appellant's house for approximately one hour. SP9 invited the appellant to look for drugs at Beranang.

[4] From the appellant's house, both SP9 and the appellant rode a motorcycle brand name Modenas bearing registration No NBK 5283. The motorcycle belonged to the appellant. The appellant rode the said motorcycle with SP9 riding pillion and together, they went to the scene of the crime between 1pm or 2pm for the purpose of collecting the proceeds from the sale of a door. On arrival at the main gate of the scene of the crime, the appellant alighted from the said motorcycle and proceeded to the office of the deceased. The engine of the said motorcycle was still running and SP9 sat astride the said motorcycle and waited. According to SP9, he did not see the appellant carry anything when the appellant went to the office of the deceased. And according to SP9, he did not see any of the deceased's workers at the site. The distance between the deceased's office to where SP9 waited was about 20 steps away. SP9 waited for about ten minutes.

[5] Thereafter, SP9 heard shouts of a female voice asking for help, 'Tolong, tolong' twice. According to SP9, at that time while waiting, SP9 also heard the sounds of vehicles that passed by because the scene of the crime was near the main road. SP9 also heard the sounds of workers working at the workshop. According to SP9, he heard the shouts of, 'Tolong, tolong' (help-help) faintly and SP9 was also uncertain whether that shout for help came from the television set or radio. Nevertheless, SP9 was certain that he heard the voice of a female person asking for help.

[6] ASP Teh Boon Ang ('SP15') recorded a statement of Suri bin Muhamad ('Pak Suri') under s 112 of the Criminal Procedure Code on 12 August 2005 at about 10.30am and that statement was tendered by SP15 and marked as exh 'P80'. In his statement in exh 'P80', Pak Suri stated that on 25 April 2005 at about 3pm while he was working at the deceased's workshop, he heard the

voice of the deceased shouting for help. The voice sounded like as though the deceased was in pain. And that voice came from the deceased's office. According to Pak Suri, the deceased used to speak in a loud voice and watched television. But the deceased never shouted like that before. Since Pak Suri felt tired and thirsty, he ignored the deceased's shout for help. At that time, Pak Suri saw someone was seated astride a motorcycle located in front of the deceased's office. The distance between Pak Suri and the person who sat astride the motorcycle was about 20 metres away and Pak Suri was unable to identify that person. Pak Suri chose to continue working.

[7] SP9, who was waiting by the said motorcycle, saw the appellant hurriedly left the deceased's office carrying with him a dark-coloured lady's handbag and a knife akin to that of a Rambo knife as per exh 'P23'. According to SP9, he used to see that Rambo knife in the appellant's house even though he did not, at any time, see the appellant using the said knife. SP9 saw the attire worn by the appellant at the waist level was stained with blood. When SP9 asked the appellant what had happened, the appellant replied that they had merely quarreled. SP9 quickly asked the appellant to go to a tin mine in Panchor. The appellant then rode pillion on the said motorcycle with SP9 and together, they left the scene of the crime.

[8] Meanwhile, Pak Suri continued with his work. About five minutes later Pak Suri stopped work because he wanted to drink some water. Pak Suri, who often borrowed money from the deceased, decided that he wanted to see the deceased in order to borrow money from her because on that day, he had no money. So, Pak Suri went to the deceased's office and, as he opened the door, he saw the deceased was lying on the floor in a pool of blood. Pak Suri then telephoned his friend by the name of Rosaidi Zakaria ('SP4').

[9] SP4 was one of the employees of the deceased and he was also the colleague of Vejaya a/l Munusamy ('SP6'), Pak Suri and Azfar. According to SP4, on that fateful day, he sent goods on two occasions with SP6. As SP4 and SP6 were sending goods on the second occasion, SP4 received a telephone call from Pak Suri who asked SP4 to urgently return to the workplace soonest. Upon returning, SP4 opened the door of his employer's office and saw the deceased lying on the floor in a pool of blood. At that time, Pak Suri and SP6 stood behind SP4 and they did not enter the deceased's office. SP4 quickly went to the neighbouring workshop and informed Ah Sang that the deceased had died. SP4 became panicky and he merely sat at the main door of Thian Shee Metal Trading.

[10] Realising that his employer had died, SP6 had the presence of mind to proceed on a motorcycle to the police station at Paroi. There, SP6 met Lance Corporal Mohd Norshahiran Abdullah ('SP5') and informed the latter that his

employer was lying in a pool of blood and asked SP5 to send an ambulance to the scene of the crime. SP5 informed the officer in charge of the police station in Paroi and SP5 thereafter lodged a first information report vide Paroi Report 000969/05 dated 25 April 2005 at 3.31 pm (exh 'P9'). About ten minutes later, a police party followed SP6 to the scene of the crime. On arrival, SP6 saw SP4, Pak Suri and Ah Sang were waiting at the main door of Thian Shee Metal Trading.

[11] Meanwhile, SP9 and the appellant went to the tin mine in Panchor which was located approximately 3km from the scene of the crime. They went there on a motorcycle. On arrival, the appellant alighted from the said motorcycle near the tin mine and the appellant directed SP9 to go to the appellant's house and get a fresh shirt for the appellant. Once again, when SP9 enquired, the appellant merely said that he only quarreled with the deceased. SP9 then proceeded to the appellant's house on the said motorcycle and, upon arrival, SP9 entered the appellant's house and took the appellant's shirt from the bag. According to SP9, at that time, the appellant's mother was fast asleep. SP9 then proceeded to the same tin mine and handed the shirt to the appellant. SP9 also saw the appellant was washing his blood stained shirt. The Rambo knife (exh 'P23') and the dark-coloured lady's handbag were still with the appellant. SP9 also saw the appellant wash the Rambo knife (exh 'P23') using the water from the tin mine. Thereafter, SP9 saw the appellant putting on the shirt which SP9 took from the appellant's house. According to SP9, the appellant momentarily opened the dark-coloured lady's handbag and SP9 saw a wallet and a handphone inside the said handbag. Soon thereafter, SP9 rode pillion on the said motorcycle with the appellant and together, they proceeded in the direction of Beranang.

[12] On the way to Beranang, the appellant asked SP9 to stop by the side of a factory at Jalan Jelebu-Pantai. SP9 complied. The appellant alighted from the said motorcycle and carried the Rambo knife (exh 'P23') and hid the said knife in between the stones as reflected in the photographs 'P8F' and 'P8K', while SP9 remained on the motorcycle. SP9 waited and observed from a distance of about 20 steps. According to SP9, it took the appellant five minutes to hide the said knife. Thereafter, both SP9 and the appellant proceeded to Beranang with the dark-coloured lady's handbag placed in the carrier basket of the said motorcycle.

[13] Meanwhile, DSP Ng Fook Long ('SP12'), the investigating officer, and his team which included Lance Corporal Ramachandran a/l Govindrajoo ('SP1'), the photographer, proceeded to the scene of the crime. SP12 directed SP1 to take 37 photographs as seen at exh 'P4'. SP12 collected several exhibits

at the scene of the crime and drew the rough sketch plan at exh 'P4' with the key marked as exh 'P41K'. On 25 April 2005, the body of the deceased was brought to the Seremban Hospital.

[14] On 26 April 2005 at about 2pm, Chan Yoke Lin @ Cindy Cheh ('SP8') identified the body of the deceased as her mother at the mortuary of the Seremban Hospital. Also present at the mortuary were SP12 and SP1. The pathologist Dr Mohamad Azaini Ibrahim ('SP11') conducted the post mortem on the deceased and SP1 also took 19 photographs as per exhibits marked as 'P5A' to 'P5S'. SP11 confirmed that the deceased sustained the following injuries:

(1) Abrasion 0.4 x 0.1 cm below the nose.

(2) An incised wound 12 x 0.4 cm on the right side of the neck, incising only the skin.

(3) An incised wound 3.5 x 1 cm on the front of the neck, also incising the skin.

(4) A stab wound on the left side of the neck 4 cm from the midline, 2 x 0.8 cm and 3 cm deep directed downward. No vital neck structure was injured.

(5) A linear abrasion wound 6 x 0.2 cm and an abraded bruise 1.5 x 1.5 cm on the upper part of the right upper arm.

(6) A stab wound 4 x 1.7 cm and 17 cm deep seen on the abdomen, 5.5 cm left of the midline, 108 cm above the heel and 34 cm below the left shoulder. This wound was directed front to back and upward relative to the body. A superficial incised wound 3.5 x 0.2 cm was noted 1.5 cm medial to the stab wound.

(7) Few small abrasions on the right knee.

[15] An internal examination was conducted on the body of the deceased and SP11 found one stab wound measuring 4cm long at the wall of the heart at the right ventricle. This internal stab wound began at the abdomen region and it injured the liver and the heart of the deceased. SP11 confirmed that these injuries could cause death within a short span of time and if not treated immediately, the injured person has no chance of survival. SP11 also confirmed that the deceased did not suffer from any ailment that would cause her death. SP11 also took the relevant samples from the body of the deceased as well as the deceased's clothing and handed it to SP12, the investigating officer. SP11 prepared the post mortem report as per exh 'P40' and handed same to SP12. SP11 listed the cause of death in his post mortem report in exh 'P40' as, 'stab wound to the heart'.

[16] Reverting to SP9 and the appellant, evidence was led to show that both

SP9 and the appellant continued with their lives and worked as security guards at Putrajaya. They both stayed at a hostel in Dengkil. Two weeks after the date of the offence, SP9 met one of the drug sellers in Seremban who told him that 'Ah Son' — the deceased, had died. And when SP9 returned to Dengkil, SP9 asked the appellant about the matter. The appellant narrated the story and said that he ('the appellant') had a quarrel with the deceased. The appellant then told SP9 that the deceased had assaulted him with an iron (exh 'P47') and at that time, the Rambo knife (exh 'P23') was used to stab the deceased. According to SP9, the appellant narrated the story while laughing. When SP9 asked in a serious tone, the appellant replied in jest and asked, 'Don't you believe my story?'.

[17] SP9 testified that he was remanded for two days suspected to be involved in the murder of the deceased.

[18] On 19 May 2005 at 3.18pm, SP12 sent the deceased's blood specimen to the chemist Dr Kamarrudin Asri and an acknowledgment slip from the Chemistry Department ID43 was received. Again, on 19 May 2005 at 3.35pm, SP12 sent some specimens to the chemist Lim Kong Boon and an acknowledgment slip from the Chemistry Department ID42 was received.

[19] Some three months after the death of the deceased, Chief Inspector Prama Kumar ('SP10') arrested the appellant. This was on 3 August 2005 at about 1.29am.

[20] On 6 August 2005 at about 1pm, SP10 and four police personnel were taken by the appellant to house No 71A, Jalan Murni, Rumah Rakyat Panchor, Paroi and there, SP10 seized a grey-coloured crash helmet (exh 'P26'), a motorcycle key (exh 'P27') and one motorcycle Modenas No NBK 5283 (exh 'P28'). A search list (exh 'P24') was issued by SP10 and it was signed by the appellant. SP10 also lodged a police report pertaining to the seizures of these exhs vide Police Report No 1931/2005.

[21] Thereafter, on the same day — and that would be on 6 August 2005, SP10 and the police party were led by the appellant to an unnumbered house at kilometres 38, Kampong Kubang, Nilai. In that house, SP10 met the occupant of the house by the name of Sharifah bt Ahmad and SP10 seized from her a pair of shoes brand name 'Power', which was grey in colour (exhs 'P15' and 'P17') and located at the verandah of the said house. The search list (exh 'P29') was then issued by SP10 to Sharifah bt Ahmad. SP10 also lodged a police report vide Nilai Report No 4667/2005 on the same day pertaining to the recovery of the said shoes.

[22] On 6 August 2005 at about 5.45pm, the appellant led SP10 and five

police personnel to an area near to the Rubber Conveyor Belt Factory at Batu 5, Jalan Jelebu-Pantai, Seremban. There, Lance Corporal Bahari used a metal detector to trace an object in that area. Five minutes later, the metal detector detected an object by making a sound. SP10 then directed detective Sergeant Muhamad to dig at the spot. After digging for about half a feet, a knife with its sheath (exh 'P23') were found.

[23] SP10 testified that before he proceeded to the said factory, he asked the appellant and the appellant told him that the appellant could show the knife that was used to stab the Chinese woman. In its Malay language text, the appellant told SP10:

> Saya boleh tunjukkan tempat pisau yang digunakan semasa tikam perempuan Cina.

[24] SP10 did not record in any document the exact words uttered by the appellant. The words reproduced above were mere estimation of what SP10 testified that the appellant had told SP10 about the location of the knife (exh 'P23'). A search list (exh 'P30') was issued by the appellant pertaining to the recovery of the knife (exh 'P23') and it was also signed by the appellant. On his return to the police station with the knife (exh 'P23') and the appellant, SP10 lodged a police report vide Pantai Report 164/2003 as per exh 'P31'.

[25] SP12 sent all the exhibits to the government chemist and on 15 November 2005 via Lance Corporal Mohamad bin Jabar, the chemist report (exh 'P44') was obtained. Exhibit 'P44' showed that although there were traces of blood on the Rambo knife (exh 'P23') and the pair of shoes with brand name 'Power', especially the right shoe (exh 'P15'), but no specific DNA profile could be found on them.

[26] The government chemist by the name of Saiful Fazamil Mohd Ali ('SP7') received four envelopes from chemist Lim Kong Boon for analysis in regard to the imprint of the sole of a bloodstained shoe found at the scene of the crime. The four envelopes contained the following items:

(a) one envelope marked 'E3' (exh 'P10') containing two 'pieces of a cut rubber mat marked 'E3(i)' and 'E3(ii)' bearing an imprint of the sole of a blood stained shoe (exh 'P11');

(b) one envelope marked 'E5' (exh 'P12') containing one 'piece of a cut rubber mat marked 'E5' bearing the imprint of the sole of a blood stained shoe (exh 'P13');

(c) one 'envelope marked 'F4' (exh 'P14') containing the right shoe (exh 'P15') with brand name 'Power'; and

(d) one envelope marked 'F5' (exh 'P16') containing the left shoe (exh 'P17') with brand name 'Power'.

[27] SP7 then transferred the imprint of the sole of the right shoe (exh 'P15') with brand name 'Power' to a transparency (exh 'P18') and the imprint of the sole of the left shoe (exh 'P17') with brand name 'Power' to a transparency (exh 'P19'). From his observation, SP7 confirmed that the imprint of the sole of a blood stained shoe on the cut rubber mat marked 'E3(i)' is similar to the sole of the right shoe (exh 'P15') with brand name 'Power'. While the imprint of a blood stained shoe on the cut rubber mat marked 'E3(ii)' is similar to the sole of the left shoe (exh 'P17').

[28] And SP7 also confirmed that the imprint of the sole of a bloodstained shoe on the cut rubber mat marked 'E5' is similar to the sole of the left shoe (exh 'P17') with brand name 'Power'. It was for this reason that SP7 was of the opinion that, in all probabilities, the imprints of the soles of the blood-stained shoes on the three pieces of cut rubber mats matched the imprints of the soles of the shoes with brand name 'Power' as per exhs 'P15' and 'P17'. SP7 then prepared his chemist report (exh 'P20') pertaining to the soles of the shoes and handed the same to SP12.

[29] SP12 confirmed that, as the investigating officer of the case, he arrested five individuals suspected to have murdered the deceased. SP12 listed the suspects as SP4, SP6, Pak Suri, Abdul Asfar Abdul Aziz and Baharin Abdullah. But, according to SP12, further investigations revealed that all these five individuals were not involved in the murder of the deceased. Since SP12 was going on transfer, all his duties were taken over by ASP Wee Huat Ne ('SP13').

[30] SP13 made concerted attempts to trace Pak Suri but to no avail. SP13 went to the address of Pak Suri as stated in his identity card. Being a permanent resident, Pak Suri's identity card address showed that it was a non-existent address. SP13 wrote to the Malaysian Immigration Department by letter dated 6 January 2008 (exh 'P81') but the said department responded by letter dated 8 January 2009 (exh 'P82') stating that Pak Suri had left Malaysia on 12 January 2006 via Kuala Lumpur International Airport. SP13 also made an effort to seek assistance from members of the public to trace Pak Suri by advertising in the local newspapers as reflected in exhs 'P83', 'P84', 'P85' and 'P86'. But the results were disheartening. The immigration officer by the name of Abdul Rahim Abdul Mulok ('SP14') testified that according to the records of his department, Pak Suri left Malaysia on 12 January 2006 and he did not enter Malaysia after that date.

THE DEFENCE OF THE APPELLANT

[31] The appellant elected to give his evidence under oath. In his evidence,

A the appellant admitted that on 25 April 2005, SP9 came to the appellant's house. Then both of them discussed about going to the deceased's shop to collect the balance of the money in regard to the sale of a window, frame and door which the appellant had sold to the deceased one week before the incident. The appellant admitted riding the motorcycle NBK 5283 (exh 'P28') B with SP9 riding pillion. The appellant stated that he brought along a sling bag containing his personal items but he did not bring any weapon. According to the appellant, they reached the deceased's shop at about 1.30pm or 2pm in the afternoon.

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[32] On arrival at the main gate of the deceased's premises, the appellant entered the office of the deceased leaving SP9 to wait on the motorcycle. The distance between the motorcycle to the deceased's office was approximately 20 feet. The appellant admitted that he frequented the office of the deceased. D When the appellant entered the deceased's office on that fateful day, the deceased was seated on a chair at her table while the appellant stood in front of the table facing the deceased.

[33] According to the appellant, when he asked for the balance of the money E for the sale which the appellant undertook, the deceased became angry and said that she had debt problems and asked that the payment to the appellant be deferred. According to the appellant, the deceased had insulted the appellant using foul language even though she did not raise her voice. The appellant continued to speak in a normal tone and asked the deceased to fulfil her F promise to pay the appellant on that day. The appellant admitted that there were verbal exchanges between the appellant and the deceased and this lasted for about 10–15 minutes.

G **[34]** According to the appellant, all of a sudden, the deceased took an iron (exh 'P47') from the shelves near to her table and swung towards the appellant twice. The deceased then asked the appellant to leave her office but the appellant was adamant and said that he came to get the balance of the money from the proceeds of the sale. At that juncture, the appellant saw a knife in its H sheath located on the deceased's table as reflected in photograph exh 'P4', and the appellant swiftly took it. The appellant pulled out the knife from its sheath. There was a struggle between the appellant and the deceased who was still holding onto the iron. It was during this struggle, the deceased came nearer to the appellant and the knife held by the appellant accidentally pierced the I deceased. The appellant told the deceased that blood came out from her body. The deceased then attempted to get out of her office to call her workers but, instead, returned to her office. The appellant reiterated and told the deceased that there was blood on her body. The appellant emphasised that he held the knife to defend himself.

[35] The appellant admitted that he left the deceased in her office and returned home to his house and cleaned himself and the knife near the stream. On the way to Beranang, the appellant admitted putting the knife near to a rubber factory. Two weeks later, the appellant came to know from SP9 that the deceased had died. The appellant emphasised that he was shocked and could not believe what SP9 had told him because when he left the deceased, she was still able to talk to him. On his return to Seremban, the appellant saw that the deceased's shop was still open as usual. The appellant emphasised that he did not run away because he doubted that the deceased had died and that he had no intention to kill the deceased.

ANALYSIS

[36] There was no eye witness who saw the appellant stab the deceased which ultimately led to her death. However, we have the evidence of SP9 who stated that he accompanied the appellant to the deceased's premises and SP9 merely waited on the motorcycle while the appellant went to the office of the deceased unarmed. SP9 waited for about ten minutes and in the course of it, SP9 heard the shouts of a female voice asking for help, 'Tolong, tolong' twice. Because of the proximity to the main road, the din of the traffic and the sounds of the workers working at the workshop, SP9 testified that he faintly heard the shouts for help. SP9 was also uncertain whether the shout for help came from the television set or radio. But SP9 was certain that it was a voice of a female person who shouted for help.

[37] SP9 was not the only person who heard the shout for help. Pak Suri too heard the same shout for help. Pak Suri's statement in exh 'P80' makes for an interesting reading material. Pak Suri recounted that on 25 April 2005 at about 3pm, while he was working at the deceased's workshop, he heard the voice of the deceased shouting for help. Pak Suri said that the voice sounded like as though the deceased was in pain. He acknowledged that the deceased used to speak in a loud voice but she never shouted like that before. The voice came from the direction of the deceased's office. Pak Suri ignored the deceased's call for help and he continued working. At that time, Pak Suri saw someone seated on a motorcycle about 20 metres away from the deceased's office and Pak Suri was unable to identify that individual. About five minutes later, Pak Suri stopped work in order to drink some water and to quench his thirst. At the same time, he thought of seeing the deceased to borrow some money. And so, Pak Suri entered the deceased's office and on opening the door, he saw the deceased lying on the floor in a pool of blood. Without further ado, Pak Suri telephoned SP4.

[38] SP9's testimony further implicated the appellant. When the appellant hurriedly left the deceased's office, SP9 saw the appellant carrying a

dark-coloured lady's handbag and a Rambo knife (exh 'P23'). SP9 recognised that Rambo knife (exh 'P23') because he used to see it in the appellant's house. SP9 also saw the attire worn by the appellant covered with blood at the waist level. When questioned by SP9, the appellant replied that he had merely quarreled with the deceased. From the scene of the crime, SP9 and the appellant went to the tin mine in Panchor on the motorcycle. There, SP9 witnessed the appellant wash the bloodstained shirt and the Rambo knife (exh 'P23') using the water from the tin mine. And SP9 also saw the appellant change to a clean shirt which SP9 had taken from the appellant's house. SP9 also had the opportunity to see the contents of the dark-coloured lady's handbag when the appellant momentarily opened the said handbag.

[39] SP9's narration of the facts continued. It showed that the appellant hid the Rambo knife (exh 'P23') in between the stones near to the factory at Jalan Jelebu-Pantai.

[40] It was argued by learned counsel that it was dangerous to convict the appellant based on the evidence of SP9, a self confessed drug addict. Under cross-examination, SP9 admitted that in 2005, he was a hardcore drug addict. But his addiction at the time of giving evidence had reduced. SP9 also admitted that he was arrested by the police and was remanded for two days as he was suspected of being involved in the case. At p 31 of the appeal record, this was what SP9 said under cross-examination:

> Pada 2005 saya menagih. Sekarang saya masih menagih tetapi kurang. Dalam tahun 2005 saya menagih lebih dahsyat. Dalam kes ini saya ditangkap polis. Saya ditahan reman, selama 2 hari. Saya disyaki terlibat dalam kes ini.

[41] The High Court judge made a finding of fact in his judgment as seen at pp 13–14 of the additional appeal record. This was what His Lordship said:

> Berdasarkan semua keterangan di atas, sememangnyalah OKT telah pergi ke pejabat si mati sehinggalah dia keluar dari pejabat si mati memegang sebilah pisau di tangannya dan di satu tangan lain memegang beg sandang perempuan dan pakaiannya mempunyai kesan darah. Hal keadaan keterangan melihatkan penglibatan OKT berkaitan peristiwa terbunuhnya si mati. Tiada sesiapa yang lain yang berada di tempat kejadian pembunuhan (pejabat si mati). SP9 tidak diragui, malah tidak berbohong walaupun sebagai rakan OKT dia berpeluang untuk berpaling-tadah.

[42] Fact finding which must necessarily include the assessment of credibility plays an important role in a criminal trial. The 'credibility' of the evidence of a particular witness like SP9 refers to the question of whether the High Court judge has accepted that witness as truthful. Of course, the demeanour of SP9 as a witness is significant in judging credibility. And that is

within the domain of the High Court judge. As an appellate court, we are reluctant to interfere with a decision based on veracity by the trial court which saw and heard the witnesses.

[43] The evidence of SP9 as to what took place at the scene of the crime has been supported by Pak Suri whose statement was recorded and tendered as exh 'P80'. Attempts to trace Pak Suri proved futile as reflected in the evidence of SP13. The statement of Pak Suri recorded under s 112 of the Criminal Procedure Code is admissible under s 32 of the Evidence Act 1950. That s 32 deals with statements of persons who cannot be called as witnesses because, (a) they are dead; (b) they cannot be found; (c) they have become incapable of giving evidence; (d) their evidence cannot be procured without an amount of delay or expense which appears to the court to be unreasonable under the circumstances of the case.

[44] Section 32 of the Evidence Act 1950 is an exception to the general rule of evidence which requires the best evidence to be adduced (*Public Prosecutor v Mohamad Fairus bin Omar* [1997] 5 MLJ 57 (HC); *Leong Hong Khie v Public Prosecutor*, *Leong Hong Khie Tan Gong Wai v Public Prosecutor* [1986] 2 MLJ 206 (FC); *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 (FC); and *Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306 (HC)). Here, the prosecution has proved that Pak Suri has made a statement in the course of an investigation regarding an offence of murder, and that Pak Suri could not be found and his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable.

[45] From the facts narrated in extenso, the circumstantial evidence is solid as the rock of Gibraltar, so to speak. Every thread of circumstantial evidence tendered and produced by the prosecution when combined together is strong enough to make a rope that would link the appellant to the charge of murder and that rope is also strong enough to convict him beyond reasonable doubt. In the words of Mohamed Azmi Kamaruddin SCJ in *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148 (SC), at p 150:

> In a case of the present nature, where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at the guilt of the accused.

[46] Abdoolcader FJ in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC), aptly said at p 275:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt.

[47] In order to sustain a conviction, the circumstantial evidence, must be complete pointing to the guilt of the accused (*Jaswant v State (Delhi Administration)* AIR 1979 SC 190; and *Bhagwandas Keshwani etc v State of Rajasthan* AIR 1974 SC 898). On a reasonable hypothesis, the conclusion must be that the accused is guilty; and that conclusion must not be based on fantastic possibilities or freak inferences but rather on rational deductions which reasonable minds make from the probative force of the facts and circumstances (*Mohan Lai Pangasa v The State of UP* AIR 1974 SC 1144). To put it differently, circumstantial evidence must be a combination of facts that it would create a network, so strong, that there is no escape for the accused for the simple reason that the facts taken as a whole do not admit of any other inference but the guilt of the accused (*Anant Chintaman Lagu v The State of Bombay* AIR 1960 SC 500 at p 523). Circumstantial evidence must be so strong that it should not only be consistent with the guilt of the accused, it should also be inconsistent with his innocence.

[48] When the prosecution is relying on circumstantial evidence in order to justify the inference of guilt, all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person. The facts and circumstances must point to the guilt of the accused only. The chain of evidence must be complete so as not to leave any reasonable doubt that the crime was committed by the accused. The criterion to apply when confronted with circumstantial evidence is whether the evidence led is such that it would satisfy the trial court beyond reasonable doubt of the guilt of the accused. The combined effect of all the proved facts taken together must prove the guilt of the accused beyond reasonable doubt, and such a conviction would be upheld by the appellate court on appeal.

[49] From the long line of authorities, the following three tests must be satisfied when the prosecution is relying on circumstantial evidence:

(a) that the circumstances from which an inference of guilt is sought to be drawn, must be cogent and firmly established by the witnesses for the prosecution;

(b) those circumstances must unerringly point to the guilt of the accused; and

(c) taken cumulatively, the circumstances should form a strong chain that there is no escape from the conclusion that the crime was committed by the accused and no one else.

[50] Here, the presence of the appellant at the deceased's office on that fateful day was borne out by SP9 and Pak Suri. The appellant led SP10 to house No 71 A, Jalan Murni, Rumah Rakyat Panchor, Paroi and there, SP10 seized the motorcycle (exh 'P28') which belonged to the appellant and which the appellant used to go to the scene of the crime with SP9. In the same house, SP10 also seized the key (exh 'P27') to the said motorcycle. In the course of the trial before the High Court judge, His Lordship adjourned the proceedings and proceeded to the court premises together with the appellant, the deputy public prosecutor having conducted the prosecution then and learned defence counsel, and there, His Lordship witnessed learned defence counsel using the key (exh 'P27') and successfully inserted it into the ignition of the said motorcycle. In the same house, SP10 also seized a grey-coloured crash helmet (exh 'P26').

[51] Notwithstanding that SP9 did not see the appellant carry anything when the appellant alighted from the motorcycle and proceeded to the deceased's office, yet when the appellant hurriedly left the deceased's office, SP9 saw the appellant carry a Rambo knife (exh 'P23') and according to SP9, he used to see that Rambo knife (exh 'P23') in the appellant's house. Later, SP9 also saw the appellant wash the blood off the Rambo knife (exh 'P23') using the water from the tin mine. And SP9 also saw the appellant hide the Rambo knife (exh 'P23') in between the stones near to the factory at Jalan Jelebu-Pantai. SP9 also identified the Rambo knife (exh 'P23') during the trial.

[52] Notwithstanding that SP9 admitted that he was a drug addict, his evidence was not wanting in credibility. SP9 admitted that together with the appellant, they were looking for drugs in Beranang. SP9 could have chosen not to reveal his background as a drug addict but he chose to be forthright and he came clean before the High Court judge and told the truth. SP9 could have turned turtle and not render evidence in favour of the prosecution, yet he testified and revealed everything to the High Court judge.

[53] In our judgment, SP9 is a witness worthy of credit. No taint should accordingly be attached to him.

[54] It is a correct statement of the law to state that if a witness' evidence is improbable, then it would be a good reason for rejecting his evidence or according that evidence very little weight. And where the evidence of a witness accords with the probabilities of the case, it would be a serious misdirection if the trial court give little or no weight to the evidence of the witness on the

ground of credibility. Here, the High Court judge was perfectly right in according credibility to SP9 as a credible witness. In assessing the evidence of prosecution witnesses be it a police witness or otherwise — just like SP9, for instance, the words of Thomson CJ in *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257, must surely be heeded. There His Lordship had this to say at p 257:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[55] Against these background facts, learned defence counsel raised only two issues before us. Firstly, that there was no actus reus or mens rea on the part of the appellant. Secondly, the conduct of the appellant in running away.

The first issue

[56] It was argued by learned defence counsel that there was no eye witness who narrated what had happened to the deceased when the appellant went to see the deceased in the deceased's office. According to learned defence counsel, SP11 — the pathologist, testified under cross-examination at pp 49–50 of the additional appeal record No 1 that:

> The stab wound to the abdomen injured the liver and ended in the heart. A stab wound can be inflicted when one runs into a person holding a knife. In such a situation the knife can enter the abdomen ending in the heart of the person running into the said person holding the knife.

[57] And flowing from the evidence of SP11, it was submitted that the defence of the appellant tallied with the evidence of SP11. The appellant defence was that during the struggle between the appellant and the deceased who was still holding onto the iron, it was in the course of that struggle that the deceased came nearer to the appellant and the knife held by the appellant accidentally pierced the deceased. There was, according to learned defence counsel, no direct evidence that the appellant had used the Rambo knife (exh 'P23') against the deceased.

[58] Learned defence counsel also referred to the evidence of SP12, the investigating officer, who said under re-examination that there was a possibility that the victim lurched towards the assailant. In its original Malay language text, this was what SP12 testified under re-examination at p 71 of the additional appeal record No 1:

Kemungkinan mangsa menerpa ke arah tuan punya tapak kasut adalah berdasarkan kepada gambar ini.

[59] It was the stand of the appellant that the deceased was able to talk even after she was stabbed and this showed that the appellant had no intention to kill the deceased. In his defence, the appellant testified in examination-in-chief as follows (see p 84 of the additional appeal record No 1):

Lebih kurang 2 minggu, SP9 beritahu Ah Soh (referring to the deceased) sudah mati. Saya terperanjat dan beritahu SP9 Ah Soh (referring to the deceased) boleh bercakap dengan saya.

Lepas keluar dari kabin, saya beritahu SP9 saya bertekak dengan Ah Soh (referring to the deceased). Saya tak percaya SP9 kerana masa itu saya masih boleh bercakap dengan Ah Soh (referring to the deceased)

[60] Further down at pp 84–85 of the additional appeal record No 1, the appellant re-iterated in his examination-in-chief that he had no intention to kill Ah Soh (referring to the deceased). This was what the appellant said:

Saya tak ada niat bunuh Ah Soh (referring to the deceased).

[61] There is a Latin phrase that merits reproduction. It is worded in this way, 'actus non facit reum nisi mens sit rea', which means, 'an act does not make a man guilty of a crime, unless his mind be also guilty'. To pin criminal liability, both the actus reus and the mens rea must be present. This brings to the forefront the principle of concurrence. A classic case in point would be the case of *Meli v R* [1954] 1 WLR 228, a decision of the Privy Council. In that case, the appellants took their victim to a hut, got him drunk and then attacked him, intending to kill him. The appellants believed that they had killed him when he was, in fact, only rendered unconscious. They disposed of the victim's 'corpse' by rolling it down a cliff. But medical evidence showed that the cause of death was exposure and not the initial attack at the hut.

[62] The appellants in *Thabo Meli* valiantly argued that they committed two acts. The first act was in relation to the attack in the hut and it was done with the requisite mens rea. The second act was in relation to the disposal of the body and that was the cause of death and it was done without mens rea. Lord Reid writing for the Privy Council rejected the appellants' argument and held:

It appears to Their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and

> thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. There appears to be no case either in South Afica or England, or for that matter elsewhere, which resembles the present. Their Lordships can find no difference relevant to the present case between the law of South Africa and the law of England, and they are of opinion that by both laws there could be no separation such as that for which the accused contend, so as to reduce the crime from murder to a lesser crime, merely because the accused were under some misapprehension for a time during the completion of their criminal plot.

[63] It must be recalled that the appellant here testified that he was shocked when SP9 told him about two weeks after the incident that the deceased had died because when the appellant left the deceased she was able to talk to him. In the course of the struggle the appellant said that the knife held by him accidentally pierced the deceased. Here, there was only one act, not two like *Thabo Meli*. Here, the cause of death was 'stab wound to the heart' and not exposure to the cold weather like the deceased in *Thabo Meli*. Here, when the appellant stabbed the deceased with the Rambo knife (exh 'P23') in the abdomen region, he had the intention of causing bodily injury sufficient in the ordinary course of nature to cause death.

[64] Learned defence counsel re-iterated about the danger to accept the evidence of SP9, a self-confessed drug addict.

[65] It was argued by learned defence counsel that the Rambo knife (exh 'P23') was not the murder weapon. In this connection, the evidence of SP11 under re-examination at p 50 of the additional appeal record No 1 was referred to:

> Dari hasil pemeriksaan saya luka ini tidak menunjukkan kesan abrasion tetapi seperti yang telah saya maklumkan tadi, luka sebegini boleh juga disebabkan oleh pisau yang bergerigi, dalam erti kata lain pisau bergerigi 'may or may not' hasilkan kesan abrasion pada satu hujung luka tikaman itu.

[66] But, under cross-examination, SP11 testified that the Rambo knife (exh 'P23') could have caused the wound in the abdomen. This was what SP11 said under under cross-examination at p 50 of the additional appeal record No 1:

> The wound in the abdomen can be caused by P23 (referring to the Rambo knife). P23 or any knife which is serrated at the upper portion of it may sometimes produce abrasions on one edge of the entry wound.

[67] The High Court judge accepted the evidence of SP11 in relation to the

Rambo knife (exh 'P23') to the effect that SP11 cannot rule out the possibility that the said knife could have caused the injuries sustained by the deceased. At pp 7–8 of the additional appeal record, His Lordship had this to say:

> (iii) Saksi ini juga menyatakan mana-mana jenis pisau boleh mengakibatkan kecederaan tikaman pada si mati. Seterusnya apabila ditanya soalan dan ditunjukkan sebilah pisau 'Rambo' iaitu P23 kepada saksi ini, beliau tidak menolak kemungkinan bahawa pisau serupa P23 boleh juga mengakibatkan kesan tikaman pada si mati. Walaupun saksi ini menyatakan bahawa bentuk tikaman pada si mati adalah 'clean cut wound', tetapi saksi ini tidak menolak kemungkinan bahawa pisau bergerigi seperti P23 boleh juga menghasilkan kesan luka tikaman pada si mati. Mahkamah telah menilai keterangan saksi pakar ini yang mana segala penjelasan yang diberikan oleh beliau adalah begitu jelas tanpa wujud apa-apa keraguan. Mahkamah boleh menerima penjelasan keterangan saksi ini.

[68] Again, in his written grounds of judgment at p 20 of the additional appeal record, the High Court judge alluded to the usage of the Rambo knife (exh 'P23') in this way:

> Pisau 'Rambo' (P23) yang digunakan adalah satu senjata yang mengerikan. la bukan sebilah pisau biasa. Dan dalam menggunakannya ke atas mangsa, boleh menyebabkan kecederaan tubuh badan yang adalah cukup pada lazimnya menyebabkan kematian.

[69] We agree with the High Court judge's assessment that the murder weapon must have been the Rambo knife (exh 'P23') because that was the knife which SP9 saw the appellant holding as the appellant hurriedly left the deceased's office. That was also the same knife which SP9 saw the appellant cleaning using the water from the tin mine to wash off the blood.

[70] At this juncture, it is germane to refer to ss 299– 300 of the Penal Code. Raja Azlan Shah FJ (as His Royal Highness then was) lucidly explained the distinctions between these two sections in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC) at p 176, in this way:

> Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that … the act is likely to cause death.
>
> Section 300 of the Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary course of nature to cause

death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

The words which I have italised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of s 300 of the Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example. It is on a comparison of these two limbs of ss 299–300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

[71] For ease of reference s 299 of the Penal Code is reproduced herein:

Culpable homicide

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[72] Section 300 of the Penal Code is also reproduced herein:

Murder

300. Except in the cases hereinafter excepted, culpable homicide is murder-

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[73] It is apparent that the offence of murder is defined in terms of culpable homicide. An offence is said to be culpable homicide where the likelihood of death is lower or where the offence that would otherwise be murder is statutorily reduced to culpable homicide.

[74] It is a daunting exercise to interpret the murder provisions in s 300 of the Penal Code. The difficulty lies in not only distinguishing the four clauses in s 300 of the Penal Code, but also the difficulty in distinguishing them with the culpable homicide provisions. The circumstances where murder is reduced to culpable homicide not amounting to murder are specified in the exceptions set out in s 300 of the Penal Code.

[75] The four clauses in s 300 of the Penal Code create distinct categories. A brief examination of these four clauses will now be undertaken.

(a) Intention to kill

[76] An intention to kill is the most important ingredient in a charge of murder. An intention to kill is inferred from the conduct of the offender after the killing. And where lethal weapons are used by the offencer in killing the victim, an intention to kill may be inferred. In a situation where the offender had attacked a vital part of the body of the victim, an intention to kill may also be inferred.

(b) Intention to cause such bodily injury as the offender knows is likely to cause death

[77] This clause envisages the situation where the offender is aware of the special condition of the victim. Thus, if the offender knew that the victim was a haemophiliac and the offender caused grievous hurt to him which result in the victim succumbing to the injuries because of the victim's peculiar condition, that would be murder.

(c) Intention to cause such bodily injury which is sufficient in the ordinary course of nature to cause death

[78] The Indian Supreme Court in *Virsa Singh v State of Punjab* AIR 1958 SC 465 is the authority in interpreting cl (c) to s 300 of the Penal Code. There V Bose J laid down the law in a language that is easy to understand. At p 467, this was what His Lordship said:

> (12) To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300 'thirdly';
>
> First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

(13) Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

[79] *Virsa Singh*'s case espoused the objective approach to s 300(c) of the Penal Code.

[80] In *Public Prosecutor v Visuvanathan* [1978] 1 MLJ 159, the Singapore High Court held that once the intention to cause the kind of injury found to be inflicted is proved, the only relevant question to ask is whether the injury, 'as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. It is irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict'.

[81] In *Tan Joo Cheng v Public Prosecutor* [1992] 1 SLR 620, a decision of the Singapore's Court of Appeal, the objective approach was adopted in construing s 300(c) of the Penal Code. The brief facts of *Tan Joo Cheng*'s case are quite simple. The accused who was armed with a knife tried to rob the victim. A struggle ensued and the victim resisted. In the course of the struggle, the victim was stabbed in the neck. It was argued by the defence that the accused did not intend to cause any serious injury and that the stab wound occurred accidentally, in the course of the struggle. The Court of Appeal rejected this

argument and held that the accused intended to inflict the injury that was actually present. The Court of Appeal further held that at p 625:

> Even if an accused intended to inflict only a relatively minor injury, if the injury that he in fact inflicted pursuant to that intention was an injury sufficient in the ordinary course of nature to cause death, the provisions of cl (c) of s 300 would be attracted.

[82] In the context of the present appeal, the learned deputy public prosecutor in the person of Madam Munahyza bt Mustafa relied on s 300(c) of the Penal Code and argued that the injury inflicted on the deceased by the appellant was sufficient in the ordinary course of nature to cause death.

(d) Knowledge that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death

[83] This cl (d) relates not to intentionally causing death or intentional infliction of bodily injury, rather it relates to knowledge that an act is so 'imminently dangerous that it must in all probability cause death'.

[84] The learned deputy public prosecutor urged us to affirm the conviction of murder against the appellant because of the cogent and compelling circumstantial evidence against the appellant. She drew our attention to the injuries sustained by the deceased. She itemised them as follows:

(i) An incised wound 12 x 0.4 cm on the right side of the neck, incising only the skin.

(ii) An incised wound 3.5 x 1 cm on the front of the neck, also incising the skin.

(iii) A stab wound on the left side of the neck 4 cm from the midline, 2 x 0.8 cm and 3 cm deep directed downward. No vital neck structure was injured.

(iv) A stab wound 4 x 1.7 cm and 17 cm deep seen on the abdomen, 5.5 cm left of the midline, 108 cm above the heel and 34 cm below the left shoulder. This wound was directed front to back and upward relative to the body. A superficial incised wound 3.5 x 0.2 cm was noted 1.5 cm medial to the stab wound.

[85] It is purely a matter of inference by looking at the nature of the wounds to conclude that there was an intention to kill when the appellant inflicted those injuries. According to SP11 in cross-examination at p 50 of the additional appeal record No 1:

> Photo P5L shows the stab wound in the upper abdomen where the injury by the sharp object had injured the liver and heart.

[86] Continuing at the same page, SP11 testified under cross-examination that:

> The stab wound to the heart was fatal. This injury was fatal enough to cause death.

[87] Earlier in his examination-in-chief, SP11 testified as to the injuries sustained by the deceased in this way (see p 46 of the additional appeal record No 1):

> Pemeriksaan Jantung:
>
> Ventricle kanan adalah rongga jantung di kanan. Luka di ventricle sebegini disebabkan oleh alat tajam dan runcing. Sebab kehadiran darah di abdomen dan tikaman di bahagian kiri hati sebegini disebabkan oleh objek yang tajam dan runcing seperti pisau.
>
> Berdasarkan luka dan kecederaan di tubuh si mati, kecederaan yang utama adalah luka tikam di bahagian abdomen yang juga telah mencederakan hati dan seterusnya jantung si mati. Kecederaan ini boleh menyebabkan kematian dalam tempoh singkat. Dalam kecederaan seperti ini, tidak ada peluang simati dapat hidup jika tiada rawatan kecemasan diberi kepadanya.

[88] Of pertinence, the good doctor ('SP11') testified that the injuries sustained by the deceased would cause death within a short span of time. And that in such a situation, the deceased would not stand a chance to survive unless immediate medical assistance was rendered. Thus, the appellant's version that the deceased was able to talk to him after receiving the stab wound must be taken with a pinch of salt.

[89] This is a clear cut case where the appellant had used the Rambo knife (exh 'P23') and had attacked a vital part of the body of the deceased. That being the case, an intention to kill must be inferred. In the words of Thomson CJ in *Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176 (CA), at p 179:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

[90] It was argued that the appellant had accidentally pierced the deceased during the struggle and there was thus no intention to kill the deceased. If this was true, this was not immediately relayed to SP9 when the latter questioned the appellant about what had transpired in the deceased's office. And if it was true that the deceased had lurched forward towards the appellant, this was also not immediately relayed to SP9. What SP12 said about the possibility of the deceased lurching towards the appellant during re-examination, must be

viewed in its correct perspective in relation to the conduct of the appellant in not telling SP9 about what had happened in the deceased's office.

The second issue

[91] This issue revolves on the conduct of the appellant in running away which must necessarily be a piece of evidence that should be taken into account in determining the culpability of the appellant. At p 14 of the additional appeal record, the High Court judge in his written grounds of judgment had this to say:

> Perlakuan OKT melarikan diri memang boleh terjumlah kepada petunjuk kebersalahannya dalam jenayah itu dan ia adalah keterangan boleh terima. Perlakuan itu adalah sebaik sejurus kedengaran jeritan si mati meminta tolong. Terdapat satu nexus di sini dan mahkamah berpendapat sedemikian.

[92] It is germane to mention that the act of fleeing or absconding from the scene of the crime is purely a question of fact which varies from case to case. Here, SP9 heard two shouts for help from the deceased's office and SP9 was certain that it was a female voice. Pak Suri also heard the deceased's shouting for help three times in a row in a loud voice. As an employee of the deceased, Pak Suri was familiar with the deceased's voice and according to him the deceased never shouted like that before and the deceased's voice sounded like as though she was in pain. These were the damning circumstances that strongly suggest a nexus between the appellant's conduct and the offence. And such conduct is admissible under s 8 of the Evidence Act 1950 (*Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649).

[93] Lord Diplock in *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 (PC), considered the respondent's attempted flight and held that knowledge of the presence of the drugs can be inferred against the respondent.

[94] At the end of the day, the conduct of fleeing is a relevant factor to consider. And the weight to be attached to such conduct must vary from case to case. Can we really say that the appellant's flight from the deceased's office carrying with him a lady's handbag and Rambo knife (exh 'P23'), later found to be stained with blood and had to be washed by the appellant, be said to be consistent with innocence? Surely the answer would be in the negative. No one is authorised by law to inflict injuries which are sufficient to cause death in the ordinary course of nature and claim that he is not guilty of murder (to borrow the words of V Bose J in *Virsa Singh*'s case).

OBSERVATIONS

[95] The petition of appeal listed 'private defence' and 'sudden fight' as grounds to challenge the conviction for murder, yet these two defences were not ventilated before us.

[96] The High Court judge in his written grounds of judgment considered both these two defences and rejected them outright. At pp 23–26 of the additional appeal record, His Lordship had this to say:

> OKT dalam pembelaan mengutarakan 'private defence' dan 'sudden fight'. Mahkamah ini menolak dan tidak dapat menyetujui pembelaan ini atas sebab-sebab berikut:
>
> (a) Lihatlah keseluruhan kecederaan si mati. Dia mengalami kecederaan-kecederaan berikut:
>
> i lecetan ('abrasion'): di hidung;
>
> ii luka-luka mempertahankan diri ('defensive wounds'): di bahagian tangan/'forearm';
>
> iii tiga luka di tengkok: satu luka tikaman (3 sentimeter) dan dua luka hirisan - masing-masingnya 12 x 0.4 sentimeter dan 3 x 1 sentimeter);
>
> iv lecetan - lutut kanan;
>
> v tangan kanan - lecetan dan lebam;
>
> vi perut - satu luka tikaman sedalam 17 sentimeter dan luka hirisan 3.5 x 0.2 sentimeter yang berhampirannya.
>
> Adakah ini semua satu kecederaan ke atas si mati yang boleh menunjukkan satu pembelaan/justifikasi 'private defence' oleh OKT? Jawapannya adalah dalam bentuk negatif.
>
> SP11 cukup menerangkan bahawa tikaman di jantung si mati adalah kecederaan utama yang cukup untuk menyebabkan kematian. Dia juga memberi keterangan pisau serupa 'Rambo' (P23) boleh menyebab atau mengakibatkan kesan tikaman ke atas si mati.
>
> OKT memberi versi yang dia telah dipukul dengan sebatang besi dan terkena di bahagian belakang kepalanya dan dia mencapai P23 dari meja si mati untuk mempertahankan dirinya dan alasannya adalah untuk menakut-nakutkan si mati tetapi si mati meluru ke arah OKT dan telah tertikam diri. Apa yang aneh sekali, OKT dalam keterangannya mengatakan yang dia berfikir, dengan mengacu-acukan P23 ke arah si mati hanyalah cuma untuk bergurau. Alasan-alasan OKT tak boleh terima akal. Mahkamah tak dapat lihat sama sekali lojik penjelasan OKT memandangkan kecederaan-kecederaan tikaman, luka-luka, hirisan, lecetan dan lebam yang memang dialami oleh si mati seperti yang dibuktikan oleh SP11 dan diperturunkan di atas tadi.
>
> Apa yang kononnya didakwa oleh OKT yang dia cedera di kepalanya tidak pula bersokong keterangan yang bolehterima. Memang tiada apa-apa laporan kecederaan atau keterangan kukuh oleh sesiapa mahupun oleh OKT sendiri dalam kes ini.
>
> Mahkamah seterusnya menolak apa-apa pembelaan 'sudden fight' mahupun mana-mana kekecualian di bawah seksyen 300 Kanun Keseksaan. Apa-apa jua pembelaan OKT tidak meyakinkan Mahkamah ini dan ia ditolak semudahnya

setelah meneliti keseluruhan keterangan kes ini. Keterangan OKT dalam pembelaannya tidak membangkitkan apa-apa keraguan ke atas pertuduhan terhadapnya.

[97] The factual matrix showed the recovery of the Rambo knife (exh 'P23') pursuant to s 27 of the Evidence Act 1950, yet it was obliquely mentioned in the petition of appeal as a ground of appeal. And it was also not argued before us. The High Court judge considered s 27 of the Evidence Act 1950 in his grounds of judgment at p 15 of the additional appeal record. It reads as follows:

Mahkamah berpendapat maklumat yang telah diberi oleh OKT kepada SP10 telah membawa kepada penemuan P23 itu dan ia adalah termasuk di bawah seksyen 27 Akta Keterangan 1950, (lihat kes *Goi Ching Ang v Public Prosecutor* [1999] 1 ML J 507 satu keputusan Mahkamah Persekutuan). Kesan mahupun nilai probatifnya lebih daripada kemudaratannya (*Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274). Maklumat yang diberi oleh OKT menunjukkan keterangan hal keadaan penglibatan OKT dalam jenayah ini.

[98] It is always prudent to consider the defence and appreciate it no matter how weak the defence is. Be it in the form of a sworn testimony or a mere statement from the dock, the defence must be appropriately ventilated, considered and appreciated. Any failure to comply with this simple requirement is disastrous and is an appealable error (*Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238 (FC)). The High Court judge rightly considered the defence of the appellant and we must commend him for that.

[99] In the course of submitting before us, learned defence counsel acknowledged that the prosecution was relying on circumstantial evidence to prove the guilt of the appellant. Another piece of circumstantial evidence relates to the imprints of the soles of the bloodstained shoes on the three pieces of cut rubber mats which were similar to the imprints of the soles of the shoes with brand name 'Power' as per exhs 'P15' and 'P17'.

This was the opinion of SP7 and it clearly showed the presence of the appellant in the deceased's office on that fateful day. The High Court judge in his written grounds of judgment at pp 15–16 of the additional appeal record had this to say about the shoes:

Terdapat kesan-kesan tapak kasut yang dikatakan dipakai oleh OKT di atas tikar getah di bilik pejabat si mati. la termeterai di atas darah yang berlumuran di atas tikar getah itu. Sepasang kasut jenama POWER telah dirampas oleh SP10 yang telah dipandu arah oleh OKT pada 6.8.2005 ke sebuah rumah tidak bernombor di Kampung Kubang Nilai. Kasut kanan ditanda P15 dan yang kiri ditanda P17, masing-masingnya di dalam sampul surat bertanda F4 dan F5 berserta dengan kesan-kesan tapaknya di atas tikar getah (E3 dan E5) kesemuanya dihantar ke pakar forensik, Saiful Fazamil Mohd Ali (SP7) yang antara lainnya, mempunyai

A kepakaran yang mencukupi dalam 'trace evidence'. Saksi ini mendapati kesan-kesan tapak kasut di E3 dan E5 adalah serupa dengan kasut-kasut P15 dan P17. Keterangan yang OKT telah pandu-arah SP10 ke rumah di Kampung Kubang Nilai dan terjumpanya sepasang kasut P15 dan P17 itu menunjukkan lagi satu nexus pertalian penglibatan dan kehadiran OKT bersama si mati semasa kejadian. Mahkamah berpendapat sedemikian.

B

[100] Based on the circumstantial evidence, we were invited and we agreed to draw an inference of guilt against the appellant. Lord Hewart CJ in *Percival Leonard Taylor, James Weaver and George Thomas Donovan* (1928) 21 Cr App R 20, aptly said about the value of circumstantial evidence:

C

> … circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

D

CONCLUSION

[101] For the reasons alluded to in this judgment, we dismissed the appeal. The conviction and the sentence of death imposed by the High Court judge were affirmed.

E

Appeal dismissed.

F

Reported by Afiq Mohamad Noor

G

H

I